

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 HENRY MCLEAN and EDWARD RIVERA,  
5 and LUIS RAMIREZ,

6 Plaintiffs,

7 v. 10 Civ. 3950 (DLC)  
8 GARAGE MANAGEMENT CORP., et al., 09 Civ. 9325 (DLC)

9 Defendants.

10 Telephone Conference

11 Before:  
12 HON. DENISE COTE  
13 District Judge  
14

15 APPEARANCES

16  
17 KAHN OPTON LLP  
18 Attorneys for 10 Civ. 3950 Plaintiffs  
19 BY: STEPHEN H. KAHN

20 LAW OFFICE OF JUSTIN A. ZELLER, P.C.  
21 Attorneys for 09 Civ. 9325 Plaintiffs  
22 BY: BRANDON D. SHERR

23 LITTLER MENDELSON  
24 Attorneys for Defendants  
25 BY: A. MICHAEL WEBER  
MICHAEL PAPPAS  
ELIAS KAHN  
NAVEEN KABIR

1 (Case called)

2 THE COURT: Good afternoon, counsel. I have you on  
3 the speakerphone because I have a court reporter and my law  
4 clerk with me. Mr. Kahn, you're on the phone?

5 MR. S. KAHN: Yes, your Honor.

6 THE COURT: I guess I should ask Mr. Sherr, are you on  
7 the phone?

8 MR. SHERR: Yes, your Honor.

9 THE COURT: Mr. Weber, are you on the phone?

10 MR. WEBER: Yes, your Honor.

11 THE COURT: Also for the defendants, Mr. Pappas, are  
12 you on the phone?

13 MR. PAPPAS: Yes, your Honor.

14 THE COURT: Mr. Kahn.

15 MR. E. KAHN: Yes, your Honor.

16 MR. WEBER: The second Mr. Kahn. I do apologize.

17 THE COURT: Mr. Kahn?

18 MR. E. KAHN: Yes, your Honor.

19 THE COURT: Ms. Kabir?

20 MS. KABIR: Yes, your Honor.

21 THE COURT: Thank you so much. I'm going to ask that  
22 we not interrupt each other and when we begin speaking we  
23 identify ourselves by name so that the record is clear.

24 I want to begin by thanking you each for making  
25 yourselves available on short notice for this conference call.

1 I have had a chance to look at the pretrial order submissions  
2 that you provided in anticipation of our April 18th trial. I  
3 have some observations to make based on my review of those  
4 materials that I think would be helpful to counsel and help us  
5 all prepare and organize our lives going forward.

6 Before I share that with you, I want to put a little  
7 background on the record. We had several telephone conferences  
8 after 5 o'clock and without the assistance of a court reporter,  
9 so I think it might be helpful in a very brief way to describe  
10 how we got to this current point.

11 One of the recent disputes that we have been working  
12 through is the dispute between the parties as to whether or not  
13 the payroll records or the time cards would be used in this  
14 case to calculate any overtime due and owing to the plaintiffs.  
15 I permitted the plaintiffs to take some limited discovery in  
16 order to try to flesh out any argument that they would like to  
17 make to me with respect to prejudice by having at this late  
18 date to rely on the time cards as opposed to the payroll  
19 records for the calculation of the hours worked.

20 After that discovery period, I heard from the parties  
21 and decided that the plaintiffs had not shown sufficient  
22 prejudice to preclude the defendants from offering at this  
23 trial the time cards as evidence of the actual hours worked by  
24 each of the garage managers.

25 But given the fact that the defendants had not made

1 their position clear during the period of fact discovery, and  
2 indeed during fact discovery had represented that it was the  
3 payroll records that would accurately reflect the hours worked,  
4 I placed the burden on the defendants to show that the time  
5 cards were the more accurate record of the hours each garage  
6 manager worked. That is, they would have that burden at trial.  
7 I issued an order, and you made your pretrial order submissions  
8 in reliance on those discussions and rulings.

9           Then what happened is I got the pretrial order  
10 documents. Included among those documents were 12 affidavits  
11 from various plaintiffs in support of their claim that they  
12 should be compensated for working off the clock to make drops  
13 of cash in connection with their daily or weekly work as garage  
14 managers. In each of those affidavits, those 12 plaintiffs, in  
15 effect, represent that their time cards are the accurate  
16 recitation of the hours worked and that the additional time  
17 spent making these dropoffs should also be compensated.

18           There is, of course, an underlying tension between the  
19 plaintiffs' assertions in this case. The assertion that the  
20 payroll records reflect the accurate hours worked for each  
21 garage manager is one kind of assertion. The assertion that  
22 garage managers were not adequately compensated for the drops  
23 they made of cash on each workday depends, as the plaintiffs  
24 are intending to show it, on a different kind of assertion,  
25 that is, that they made these drops after they had left the

1 workplace each day as reflected in their time card records.

2 I looked beyond the 12 affidavits to the list of  
3 plaintiffs who the plaintiffs indicate will be testifying live  
4 at this trial. There are four of them. One of them, Mr.  
5 Granjeda, also is one of the 12 with an affidavit. He is  
6 representing that his time cards accurately reflect his hours  
7 worked. Two others who the plaintiffs intend to call live,  
8 McLean and Ramirez, have deposition excerpts provided by the  
9 plaintiffs as part of their pretrial order materials. In those  
10 deposition excerpts, these two plaintiffs also assert that the  
11 time card records are accurate.

12 That leaves only one plaintiff that the plaintiffs  
13 have listed in their pretrial order documents that they intend  
14 to call at this trial. For Mr. Toogood I have no affidavit. I  
15 do have some deposition excerpts that the plaintiffs have  
16 provided. Those excerpts do not make clear whether or not he  
17 believes the time cards were the more accurate reflection of  
18 the hours worked.

19 Of course, the depositions of the plaintiffs were not  
20 conducted in a way that required them necessarily to take a  
21 position on the payroll records versus the time cards issue,  
22 because counsel didn't necessarily understand that that was  
23 going to be disputed at the time the depositions were taken.  
24 So, I appreciate that.

25 Let me move ahead, then, with how I know understand

1 the case based on these pretrial order documents.

2           With respect to the presentation of the plaintiff's  
3 case as reflected in the pretrial order, the plaintiffs are  
4 largely, if not entirely, conceding that the time cards  
5 accurately reflect the hours worked. They are making that  
6 admission in the context of pursuing a claim that the time  
7 cards do not capture the hours or the minutes spent after  
8 plaintiff left the workplace in order to make the drop of cash.

9           I think we have really made a lot of progress actually  
10 in cutting through these issues. I'm going to propose that the  
11 trial on the 18th be a very narrow one. We only have one  
12 witness, Mr. Kamm, who has been identified to testify live on  
13 the issue of willfulness. Everything else is being submitted  
14 through deposition testimony. I think we should try the  
15 willfulness good faith case on April 18th.

16           At this point I think I have to assume and should  
17 assume that the time cards are the accurate reflection of the  
18 hours worked. I'm going to deny the defendants' application to  
19 decertify the class. It's untimely and not warranted, for  
20 reasons I'll explain on April 18th. I'm going to deny the  
21 application of the plaintiffs to base any decision on the drop  
22 box claim based on a representative sample. I'm going to  
23 require that each plaintiff show the extent to which they are  
24 entitled to an overtime calculation based on hours worked  
25 beyond those reflected in their time cards.

1           I'm going to ask the parties to work with Defendants'  
2 Exhibit 4D, as in David, which is reflected in their exhibit  
3 lists or exhibits under tab 15. I found that a very helpful  
4 chart or series of charts that set out in great detail for each  
5 plaintiff where the dropoff location was for their garage,  
6 whether it was on the premises, at another garage, or at a  
7 bank, and the distance between the garage at which they worked  
8 and that drop box location.

9           I am going to apply a de minimis standard besides the  
10 Reich case that the defendants cite, which can be found at 45  
11 F.3d 646. I also want to bring to counsel's attention the  
12 Singh case against the City of New York, 524 F.3d 361.  
13 Applying that law, I'm going to ask the plaintiffs to look  
14 carefully at Exhibit 4D and identify to the defendants which of  
15 the plaintiffs have non de minimis drop box claims. The  
16 defendants point out that in some of the depositions plaintiffs  
17 have already admitted that they were not necessarily the person  
18 to make the drops of cash, that they had someone else who was  
19 working with them make it, at least on occasion.

20           In any event, it is not clear to me that we need a  
21 trial on the drop box claims. I'm not sure how many plaintiffs  
22 are going to have non de minimis claims, and it is not clear to  
23 me that any limited number of plaintiffs who would have non de  
24 minimis claims can't settle those claims either through direct  
25 negotiations between the parties or with the assistance of

1 Magistrate Judge Gorenstein.

2 I want to work out a schedule here for the plaintiffs  
3 to look at this Exhibit 4D with care and notify the defendants  
4 of any individual plaintiff who has a non de minimis claim.  
5 I'm going to suggest next week, by April 10th. Mr. Kahn, is  
6 that agreeable as a schedule?

7 MR. S. KAHN: Yes, your Honor, that is. I would like  
8 to be heard on the time card issue if the appropriate moment.

9 THE COURT: OK. And I'd like the parties, please, to  
10 contact Magistrate Judge Gorenstein this afternoon. He has  
11 time before our trial date of April 18th. I want you to meet  
12 and confer and try to resolve this case on your own. If you  
13 can't, I want you to see Magistrate Judge Gorenstein before the  
14 18th to try to settle the case with his assistance, if you are  
15 unable to settle it on your own. Please contact his chambers  
16 this afternoon to arrange for a date before the 18th to see  
17 him.

18 I want counsel, please, to leave a message, morning,  
19 noon, or night, with chambers if you do settle this case and a  
20 hearing is unnecessary or a trial on the 18th, because I have  
21 other matters I can turn my attention to. I'll reserve the  
22 morning of April 18th to try the willfulness/good faith case.  
23 I hope to have some rulings on your legal issues for you if you  
24 haven't settled them by then. I noticed a number of legal  
25 disputes in your pretrial order papers. But I'm not planning

1 to take additional damage testimony on the 18th.

2 Let me turn to the parties and give you each and  
3 opportunity to be heard. Mr. Kahn, briefly.

4 MR. S. KAHN: Yes, your Honor. Plaintiffs are by no  
5 means conceding that the time cards are the accurate record of  
6 the hours worked. As a matter of fact, the more we prepare for  
7 trial, the less convinced we are of that fact. These  
8 affidavits were all prepared, your Honor, before this time card  
9 issue, before your Honor had ruled that defendants would be  
10 permitted to put time card evidence in. I think your Honor is,  
11 with all due respect, reading much too much in the testimony of  
12 these affidavits with regard to time cards.

13 All these affidavits say with regard to time cards is  
14 we punched out and we kept working. There is nothing in any of  
15 these affidavits that say these time cards accurately reflect  
16 all our work or these time cards accurately reflect all of our  
17 work except for what we sometimes do or when we always do depot  
18 drops.

19 I think your Honor has read much too much into these  
20 time cards. The time cards are not the accurate records,  
21 Judge. They certainly weren't prepared with this question in  
22 anybody's mind, your Honor. So I would strongly object to  
23 being denied the right to challenge the time card evidence.

24 THE COURT: Let me read one to you, Mr. Granjeda's,  
25 paragraph 3.

1                   MR. S. KAHN: May I have a moment to turn to it.

2                   THE COURT: "As a garage manager, at the beginning and  
3 end of every workday I punched a time card on a time clock in  
4 my garage. However, after I punched off the time card each  
5 workday, I was required to bring the daily paperwork and cash  
6 from the parking garage where I worked to the GMC depot that  
7 was closest to my garage."

8                   Those are facts. This was submitted to me with a  
9 pretrial order long after my ruling and the parties' debate  
10 about this time cards versus payroll record dispute. These  
11 facts are not going to change. They are the facts. They have  
12 sworn to them under oath. They are affidavits and  
13 declarations.

14                  I have to say, Mr. Kahn, you have been a very  
15 diligent, resourceful, creative, strong advocate for your  
16 clients, but the facts are the facts. We are all engaged here  
17 in a search for the truth. You cannot have 12 affiants and  
18 however many deponents now spend a lot of time dancing around  
19 their prior statements and trying to take them back.

20                  MR. S. KAHN: Your Honor, Mr. Granjeda, who happens to  
21 be listed as a trial witness, certainly did not mean that he  
22 does no tasks before he punches his time card. His affidavit  
23 was prepared on January 24th and, quite candidly, when I  
24 submitted it, in no way did I construe Mr. Granjeda or any of  
25 these affidavits to mean that --

1                   The defendants' time card evidence is simply not  
2 accurate, judge. I'm not trying to escape the truth. I'm  
3 trying to get to the truth. I think to overconstrue these  
4 affidavits that were prepared without any thought of addressing  
5 this particular issue would not be fair at this point in the  
6 litigation. I think, Judge, you will get to the wrong result  
7 if you don't listen to the evidence with regard to the time  
8 cards versus the payroll.

9                   THE COURT: Thank you very much, Mr. Kahn. I'm hoping  
10 that you will reflect on our conversation today and come to a  
11 different conclusion. You have all your rights to a full trial  
12 for each of the plaintiffs' claims here. But I am reversing my  
13 ruling with respect to who has the burden of showing that the  
14 payroll records are the more accurate reflection of the hours  
15 worked.

16                   From this point on, it will be assumed for each  
17 individual plaintiff that their time cards accurately reflect  
18 the hours they worked within each garage. It will be each  
19 individual plaintiff's burden, if they wish to demonstrate it,  
20 to show that the payroll records more accurately reflect the  
21 hours worked.

22                   Therefore, based on the record as it now stands, I  
23 will be calculating overtime due and owing each plaintiff based  
24 on the records created by their time cards plus any individual  
25 minutes that should be assessed because of the drop box claim

1 that I find for any individual plaintiff. That is my ruling.

2 MR. S. KAHN: May I respond, your Honor?

3 THE COURT: No. Mr. Weber, did you have anything you  
4 should to say briefly?

5 MR. WEBER: No, your Honor.

6 THE COURT: Mr. Kahn, I really don't want to extend  
7 this discussion. I want to give you a chance to reflect. You  
8 will have a full opportunity to be heard at the appropriate  
9 time. I think more is accomplished by reflecting on what I  
10 have said today than continuing this conference.

11 To make clear what the parties are going to be doing,  
12 you're going to be contacting Magistrate Judge Gorenstein this  
13 afternoon to arrange for a settlement conference under his  
14 supervision before April 18th. Plaintiffs are going to be  
15 advising defense counsel no later than April 10th of any  
16 plaintiff who has a non de minimis claim with respect to the  
17 dropoff issue. And our trial on April 18th will be addressed  
18 to the scienter issue only, the good faith and willfulness of  
19 the defendants.

20 MR. S. KAHN: Your Honor, am I not to be permitted to  
21 challenge the authenticity and the reliability of the time  
22 cards, and I'm not permitted to challenge reliability of the  
23 summary of time cards? This Mr. Stephen Kahn, I'm so sorry.

24 THE COURT: Mr. Kahn, if you have any errors to point  
25 out to the defendants with respect to their calculation of the

1 hours worked by an individual plaintiff based on the time  
2 cards, the time to do that first and foremost is in informal  
3 discussions with defense counsel. If there is an error in  
4 calculation or an absence of time cards for a week, these are  
5 things that you should be able to resolve together without  
6 litigating it at a trial.

7 With respect to the issue of whether it is time cards  
8 versus payroll records which more accurately reflect a garage  
9 manager's hours of work, we'll discuss that further. I'm not  
10 going to take evidence on it on April 18th.

11 I am hopeful that you will reflect on what I have said  
12 here and settle this case with the help if necessary of  
13 Magistrate Judge Gorenstein. Everybody has put a lot of time  
14 and energy into this. Counsel's fees are extraordinarily large  
15 in this case, I'm sure, on both sides already.

16 If necessary, I will hear every plaintiff and make an  
17 individualized determination based on the hours worked and the  
18 drop box issue and any other factual issue to calculate  
19 damages. But whether that is the way, on reflection, that each  
20 of the individual plaintiffs wants to or should proceed I'd  
21 like you to think long and hard about before you ask me to do  
22 that. I'll hear you further on April 18th.

23 MR. S. KAHN: Thank you, Judge.

24 THE COURT: Thank you, counsel.

25 (Adjourned)